

Welcome!

**California
Occupational
Safety and Health
Appeals Board**

presents

**Stakeholder
Training 2017**



Board Members

Art Carter, Chairperson

Judith Freyman, Board Member

Ed Lowry, Board Member



Agenda

9:00 Sign-in

9:30 Welcome and Introductions

9:45 **SEGMENT 1: Overview of Appeal Process**

Appealing a citation

Completing Appeal Form/Filing with the Appeals Board

Issues raised on appeal

Informal Conference

Discovery

Third-party and Intervenor Status

11:00 **SEGMENT 2: Prehearing Events**

Prehearing Conferences

Status Conferences

Settlement Conferences

Witness availability

Noon **LUNCH BREAK**

1:00 **SEGMENT 3:**

A. Conducting the Hearing

B. Do's and Don'ts

2:30 **BREAK**

2:45 **SEGMENT 4:**

A. Key Regulation Changes

B. OASIS Live Demo

4:15 **SEGMENT 5: Open discussions, comments & feedback**

5:00 **Conclusion**

Your panel today is:

Ursula Clemons, Presiding Administrative Law Judge

Neil Robinson, Presiding Administrative Law Judge

Howard Chernin, Administrative Law Judge

Kevin Reedy, Administrative Law Judge

Terms & Abbreviations

DM	District Manager
ALJ	Administrative Law Judge
PALJ	Presiding Administrative Law Judge
ER	Employer
REP	Representative
OSHAB	Occupational Safety and Health Appeals Board
DIR	Department of Industrial Relations
Cal/OSHA	Division of Occupational Safety and Health
DOSH	Division of Occupational Safety and Health
DAR	Appeals Board's Decision After Reconsideration

Segment 1

Overview of Appeal Process

9:45 am – 10:55 am

Overview of Appeal Process

(PALJ Clemons : Segment 1)

Mission of the Appeals Board

- Fairly, timely and efficiently resolve appeals
- Provide clear, consistent guidance to the public thereby promoting workplace safety and health

Two-tiered appeals process

- First level – hearing conducted before an ALJ who will issue a Decision
- Second level – file Petition for Reconsideration with the Appeals Board



How an Appeal Gets to the Appeals Board

- DOSH arrives unannounced at worksite to conduct program inspection or accident investigation (enters facility with consent or warrant)
- DOSH makes observations and issues citations which allege violations of health and safety orders (California Code of Regulations, title 8)
- ER disagrees with the citation and files appeal
- Parties are unable to resolve the appeal either on their own or with assistance of an ALJ during a telephonic conference
 - the appeal gets set for an administrative hearing in which evidence (documentary and testimonial) is presented.
- ALJ issues written Decision.
 - Parties accept it or file further appeal with the Board



Preparing the Case

DOSH Investigation & Evidentiary Issues:

- Whom did you interview – should be the person with the most relevant information (i.e. eyewitness, injured employee, supervisor, etc.)
- Did you ask 'direct' questions? (i.e. how many employees exposed to hazardous condition)
- Verify who the supervisor or manager is based upon his/her responsibilities not just the title on business card

Citation Issuance:

- Alleged violation description and applicability of safety order
- Statute of limitations
- Can the Division meet the burden of proof on all elements of the safety order?
- Can the Employer present rebuttal evidence or establish an affirmative defense?



Preparing the Case

Filing the Appeal (deadlines & consequences of late appeal)

- An appeal must be filed 15 **working** days from receipt of the citation package
- An Employer may acknowledge receipt of the citation by calling in his/her intent to appeal, but one must follow-up by filing the appeal form with the Appeals Board either on-line or via U.S. mail in a timely manner
- A late appeal will require the Employer to show “good cause” for the late filing before the matter can be docketed

Stipulations or Declaration in Lieu of Hearing

- Parties may stipulate (agree) to certain facts and inform the ALJ of such so that these need not be litigated during the hearing (i.e. date or location of incident, employee employed by employer, proposed penalty set according to the penalty setting regulations, etc.)
- A party may submit a written declaration (signed under penalty of perjury) of its witness to an opposing party at least 10 days prior to hearing. The opposing side has 7 days to object to the admission of the declaration and request the presence of the declarant witness at hearing for cross-examination. If no objection is filed, the declaration can come into evidence same as testimony. However, if cross-examination is requested, and not afforded, the declaration is deemed hearsay.

Completing Appeal Form & Filing with the Appeals Board

(PALJ Robinson – Segment 1)

Paper Appeal Form

1. www.dir.ca.gov/oshab
2. Print a separate page 2 of the appeal form for each citation and item you are appealing.
3. Fill out Appeal Form(s)
4. Make a copy of your Citation and Notification of Penalty.
5. Mail paperwork to OSHAB by certified mail.
6. Wait for correspondence from OSHAB.

Oasis Portal

1. www.dir.ca.gov/oshab
2. Register/log in to your account.
3. Enter all your appeal information into the OASIS portal.
4. Upload citation packet.
5. Submit (Demo in Segment 4)



*Click this icon
and you will be
routed to the
secure online
portal*

Filing an Appeal Form

(Paper)

OSHAB APPEAL FORM

Note: You have a total of 15 working days from receipt of a citation to file an appeal. Attach a complete copy of your citation package along with this appeal form. Failure to file a completed form may result in dismissal of the appeal. Late appeals will not be accepted unless good cause is shown. *Please print legibly or type all information.*

A. CITATION INFORMATION		
<i>Please complete the following information as indicated on your citation.</i>		
1. Case (Inspection) #:	Issuance date: / /	Reporting ID#:
2. Employer:	Date Citation Received: / /	
3. Employer legal name or DBA (Optional):		
4. Employer contact:		
5. Address:		
City:	State:	ZIP code:
6. Primary phone: ()	Secondary phone: ()	
7. Email address:		
8. Preferred method of service: <input type="checkbox"/> U.S. Postal Service OR <input type="checkbox"/> Email (Choose one only)		
B. REPRESENTATIVE INFORMATION (if any)		
1. Firm name:		
2. Representative name:		
3. Address:		
City:	State:	ZIP code:
4. Primary phone: ()	Secondary phone: ()	
5. Email address:		
6. Preferred method of service: <input type="checkbox"/> U.S. Postal Service OR <input type="checkbox"/> Email (Choose one only)		
C. CONTACT INFORMATION and SIGNATURE		
I am the: Representative ___ Employer ___ Other ___		
<i>I understand that it is my responsibility under Appeals Board regulations to notify the Appeals Board in writing if there are any changes to either employer or representative address, telephone number, and/or email address.</i>		
Signature of employer or employer's representative		Date
Print name and title		Phone No.

Employer:		Case (Inspection) #:
<i>Please note that you must complete page 2 of this OSHAB Appeal Form for each citation/item. Appellant must complete a separate page 2 for each citation/item being appealed.</i>		
D. APPEAL INFORMATION		
1. This is an Appeal of:		
<input type="checkbox"/> CITATION AND NOTIFICATION OF PENALTY CITATION No.: _____ ITEM No.: _____ <input type="checkbox"/> NOTIFICATION OF FAILURE TO ABATE ALLEGED VIOLATION <input type="checkbox"/> SPECIAL ORDER / ORDER TO TAKE SPECIAL ACTION		
2. Specific ground(s) for this appeal are: (Check all that apply)		
<input type="checkbox"/> The safety order was not violated. <input type="checkbox"/> The classification (i.e. serious, willful, repeat) is incorrect. <input type="checkbox"/> The abatement requirements are unreasonable: <input type="checkbox"/> Required changes <input type="checkbox"/> Time allowed to complete changes <input type="checkbox"/> The proposed penalty is unreasonable.		
3. An affirmative defense is a justification or excuse that if proved by appellant relieves the cited employer of all or some of the responsibility for the alleged violation. An affirmative defense must be raised by the appellant in a timely manner. Affirmative defenses for this appeal are: (Check all that apply)		
<input type="checkbox"/> Independent employee action caused the violation. <input type="checkbox"/> A different safety order applied to the work activity that is the subject of the citation, and the appellant was in compliance with that other safety order. (The different safety order should be identified.) _____ <input type="checkbox"/> An exception exists in the California Code of Regulations, Title 8 which allows for the action that is the subject of the citation. (The specific safety order containing the exception should be identified.) _____ <input type="checkbox"/> The inspection that gave rise to the citation was invalid because the Division employee who inspected the appellant's worksite failed to comply with laws governing administrative searches. <input type="checkbox"/> Another affirmative defense: other affirmative defenses may exist and can be asserted by the employer. If the appellant contends one or more affirmative defenses exist, the appellant may, but is not required to, provide a short, plain statement in writing setting forth the facts or circumstances which, if true, would prove the affirmative defense.		

Filing an Online Appeal

www.dir.ca.gov/oshab



— Add Item

Item Number

Classification

Abated? ☐

If not abated, enter date by which violation must be abated

Proposed Penalty

Regulation **Subdivision 1** **Subdivision 2** **Subdivision 3**

— Grounds for Appeal

☐ The safety order was not violated.

☐ The classification (i.e., serious, willful, repeat) is incorrect.

☐ The proposed penalty is unreasonable.

☐ The abatement requirements are unreasonable:

☐ Required changes ☐ Time allowed to complete changes

— Affirmative Defenses

☐ Independent employee action caused the violation.

☐ A different safety order applied to the work activity that is the subject of the citation, and appellant was in compliance with that other safety order. *(The different safety order should be identified.)*

☐ An exception exists in the California Code of Regulations, Title 8 which allows for the action that is the subject of the citation. *(The specific safety order containing the exception should be identified.)*

☐ The inspection that gave rise to the citation was invalid because the Division employee who inspected the appellant's worksite failed to comply with laws governing administrative searches.

☐ Another affirmative defense: other affirmative defenses may exist and can be asserted by the employer. If the appellant contends one or more affirmative defenses exist, the appellant may, but is not required to, provide a short, plain statement in writing setting forth the facts or circumstances which, if true, would prove the affirmative defense.

Type of Appeal

- Appealing Citation
- Appeal Failure to Abate
- Appealing Special Order/Special Action

Appeal Form

— Case Information

Filed Date* 02/17/2017

Appeal Type

Inspection Number*

Date Citation Issued*

Date ER Received Citation

RID Number

Region & District

Location

Appealing Citation

Appealing Citation

Appealing Failure to Abate

Appealing Special Order - Special Action

Drop down list helps filers select appealing options.

Grounds for Appeal

- Safety Order was not violated
- Classification is incorrect
- Proposed penalty is unreasonable
- Abatement requirements are unreasonable



Affirmative Defenses

- Five common affirmative defenses are listed on the form
- Any other defenses that you wish to make
- Uploading list of defenses with electronic appeal



Informal Conferences

(Judge Chernin – Segment 1)

What They Are

- Informal conferences are meetings set up between the Employer and the Division. Although the Appeals Board encourages the parties to participate in informal conferences, they are not required.
- Informal conferences are meetings where the parties can discuss the issues on appeal, share documents and discuss how to settle the case without a hearing
- Informal conferences are very helpful, and a large number of cases settle at informal conferences, saving the parties time and money.



Informal Conference Benefits

- The parties set the date and time, not the court
- The parties are not bound by any particular rules of procedure or evidence
- The parties are free to discuss openly among themselves
 - Settlement negotiations are confidential
 - BUT, evidence shared at the informal can still be used at the hearing
- Even if you do not settle the entire appeal at the informal, it might be possible to agree to certain facts (those agreed facts are called stipulations) or settle part of the appeal, thus leading to a shorter hearing

Benefits



Setting up the Informal Conference

- Employer calls the Division to schedule.
- Think about requesting discovery before the informal. Having all of the available information helps you to focus and weigh the strengths and weaknesses of your case when you're discussing the case with the Division.
- Consider if you want to bring key witnesses with you.



Discovery

(Judge Chernin – Segment 1)

Exclusive Provisions

- Sections 372, 372.1, 372.2, 372.3, and 372.9 provide the exclusive right and method of discovery in any proceeding before the Appeals Board.
- Discovery is somewhat limited, though parties still have right to obtain relevant and admissible documents, as well as identification of witnesses, and can take depositions.

Types of Discovery Permitted

- Request for Witness List (§372)
- Request for Documents (§372.1)
- Subpoenas (documents and witnesses) (§372.2)
- Depositions (§372.3)

Motions to Compel (§372.6)

- Sometimes you feel like you aren't getting everything you're entitled to, and that you requested, from the other party.
- It's a good idea to contact the other party to make sure they received and understood your request. Many times, you can work out differences informally.
- If all else fails, you can file a motion to compel. Motions to compel must be written according to the requirements of this section and section 371. The motion needs to be filed and served as well. After the motion is filed and served, the court will set hearing on the motion. The party against whom the motion is brought has the right to file and serve a reply up to the date of the motion hearing.
- Be aware of the deadline and procedural requirements for filing a motion to compel.

Discovery Abuses (§372.9)

- The ALJ has the authority to issue sanctions (including dismissing or granting an appeal) if a party abuses the discovery process by refusing to respond or by providing evasive or incomplete responses, causing surprise to the other party.
- Remove the gamesmanship from the appeal process; focus on the “big picture” and use the exchange of discovery to facilitate settlement discussions.

Division's Mandatory Production of Evidence (§372.9)

- This is a new section that requires the Division to provide the unprivileged contents of its investigation file to the appealing party within 30 days of receiving notice of the Appeal from the Board.
- Again, sharing information with the other side is a great way to encourage dialogue and possible settlement.

Discovery in Expedited Proceedings (§373)

- If your case is in the Expedited Appeal Program, special rules and deadlines apply to discovery.
- You will need to exchange discovery early, and because of the shorter time frame between filing of the appeal and the hearing, it is critical that you follow the rules closely.

Third-Party Status

(ALJ Reedy – Segment 1)

- Not DOSH or the employer
- Affected employee may file a motion for party status.
 - Who is an affected employee?
 - Purpose of gaining party status
- Authorized representative may represent employee.
- Trade Unions and Labor Organizations may seek party status.
- Affected employee's survivor may seek party status.



Motion to Intervene

Criteria ALJ Must Consider:

- Interest of the party
- Assist in determination of issues
- Will not cause delay

How Can I Help?



Third-Party vs. Intervenor

THIRD-PARTY

- The “affected employee” is the focus here
- The third party is a full participant in the proceedings

INTERVENOR

- Interest in the matter is similar to that of a party
- The intervenor’s level of participation is determined by the ALJ.



End of Segment 1

5 minute break

Segment 2 begins at 11:00am

Segment 2

Event Types

11:00am – 11:55am

EVENT TYPES

(PALJ Robinson – Segment 2)

- Status Conference
- Prehearing Conference
- Hearing
- Settlement Conference
- Expedited Events



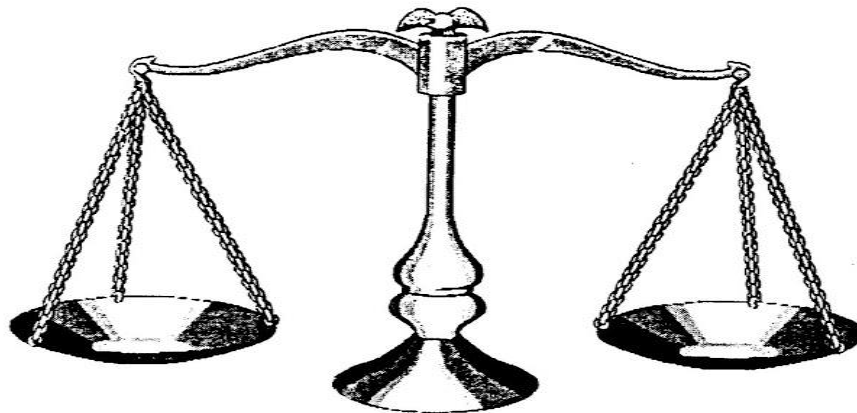
Expectations of Participants



- Know case details and be prepared to discuss them
- Know those issues that are disputed and those that are uncontested
- Have someone available with authority to resolve disputes
- Know the availability of witnesses' prior to attending a prehearing conference
 - Be ready (at the prehearing) to inform the ALJ of availability for the next 4-7 months
 - After first conference, the hearing is likely to be scheduled following 120 days (4 months)

Expectations of the ALJ

- Act judicial – always exhibit fair-mindedness
- Request and accommodate unavailable dates when setting case for hearing
- Discuss issues that cannot be resolved
 - Narrow issues for hearing
- Obtain stipulations on those facts that are undisputed
- Take care to explain process to pro-per litigants (non-represented party)



Panel Discussion

Event Types and Purposes

11:15am – 11:55am

End of Segment 2

Lunch Break (12:00pm – 12:55pm)

**Segment 3 begins promptly
at 1:00pm**

Segment 3

Part A: Conducting the Hearing

Part B: DOs and DON'Ts

1:00pm – 2:30pm

Part A: Conducting the Hearing

(PALJ Clemons – Segment 3)

Expectations of ALJs (demeanor and preparation)

- Expectations of ALJs (demeanor and preparation)
- Get parties communicating/narrow the issues
- Have the parties opened the file? (knowledge of who/what/where/when/how or why), requested discovery, determined what documents will be exhibits and who will be a witness including experts
- Knowledge of applicable DARs to inform parties of Appeals Board's position on particular issues

Evidentiary challenges

- Reasonable and adverse inferences
- Weak vs. strong evidence
- Credibility vs. veracity (no agenda or bias)

Panel Discussion

Hearings

1:15pm – 1:55pm

Part B: Practice Tips

(DOs and DON'Ts)



DO

Practice Tips

DO



- **DO** introduce your witness
- **DO** interview/prepare the witness prior to the hearing event
- **DO** consider making an opening statement (the opening statement helps the judge to follow along. It is an opportunity to outline what will prove the case)
- **DO** have photos and documents ready at the hearing
- **DO** object when appropriate (i.e., when opposing party tries to prove something not alleged)
- **DO** speak clearly (say “yes” or “no”)
- **DO** make 4 copies of each exhibit you intend to use prior to arriving at the hearing
- **DO** be prepared to discuss stipulations of fact at the beginning of the hearing (anything the parties can agree to will make the hearing run more smoothly)
- **DO** make sure that your witnesses are present to testify at the hearing
- **DO** serve witnesses with subpoenas who might not otherwise be willing to show up
- **DO** show respect to everyone at the hearing (object when appropriate; refrain from making rude comments; be professional)
- **DO** listen (questions you may have are answered by the judge at the beginning of the hearing. Pay close attention to what is being said and the hearing will run more efficiently)

More Practice Tips

- **DO** bring snacks and a water bottle for consumption during recess
- **DO** tell the truth
- **DO** remember to breathe (you may ask for reasonable breaks, so long as the breaks do not become disruptive to the proceeding)





- **DON'T** ask the ALJ whether you can or should put something into evidence
- **DON'T** ask leading questions on direct examination - keep it open ended and allow the witness to testify
- **DON'T** make hand gestures/head nodding allowed to aide in witness testimony
- **DON'T** use sounds or unclear phases such as “um” or “uh-huh” while testifying
- **DON'T** interrupt a witness (write down questions to ask on cross-examination)
- **DON'T** show up late (cases can be dismissed if a party does not show up on time)
- **DON'T** chew gum during the hearing
- **DON'T** wear a hat during the hearing. Do not wear anything that might be deemed offensive or inappropriate by others
- **DON'T** expect the court to provide office supplies (staplers, tape, easel, markers, etc.)

End of Segment 3

5 minute break

Segment 4 begins at 2:45pm

Segment 4

Part A: Key Regulation Changes

Part B: Oasis Live Demo

2:45pm – 4:15pm

Where You Can Find Our Regulations

Appeals Board regulations are published in California Code of Regulations, title 8

- Online at http://www.dir.ca.gov/title8/ch3_3.html
- Public Libraries or Public Law Libraries



New and Revised Regulations

(ALJ Reedy & ALJ Chernin – Segment 4)

§346

- Establishes the OASIS case management and court calendaring system
- OASIS is new – get to know it, get to love it!



§346.1

- Scanned documents shall be deemed identical to the original
- In other words, everything is moving to the electronic world where we won't be working with physical files anymore
- Parties still have the ability to challenge the validity of a scanned document
- Alterations, errors in scanning, etc.

§346.2

- OASIS stores documents electronically.
- Exceptions: oversized documents, physical objects, other materials that cannot be scanned.
- In cases where it can't be scanned, party offering has to maintain the original during the appeal
- Filing electronically is encouraged but not mandatory for parties. The Appeals Board will be filing its documents electronically.
- Appeals are archived for 3 years after the appeal ends (including any petition for reconsideration, writ of mandate proceeding, etc.)



§347

- Clarifies what is part of the administrative record
- Revised definition of “docketed” and “hearing record” and new definition of “pleadings”

§350.4

- Some orders, including orders dismissing appeal or granting appeal based on a party's failure to appear at a scheduled event, will be self-executing, meaning that the dismissal or granting of the appeal will become final automatically unless a party objects within the time provided by the order.

§352

- Remember, you have no expectation of privacy or confidentiality when speaking to the judge, unless it is in the context of a settlement conference. Most judges, regardless of the type of contact, will either expect you to include the other party in the conversation, or will forward your message to the other party to avoid the appearance of impropriety.

§355.1

- Remember, changes in representation need to be communicated to the Appeals Board as soon as possible, but no more than 30 days after the change is made.
- Parties can now elect whether they wish to receive electronic service of documents from the Appeals Board
- Failure to update the Appeals Board with representative information may result in dismissal or loss of party status.

§355.2

- Parties shall elect preferred method of service, either postal mail or e-mail, but not both
- If the Appeals Board serves a document that is returned undelivered or is otherwise notified that the service was ineffective, the Appeals Board shall attempt service by method of service best calculated to ensure valid service.
- Ultimately, if we can't find the party, the party may be out of luck!

RULES

§355.3

- Parties serve each other by first class postal mail, by carrier or by personal service.
 - See definition of a carrier.
- Explains when service is complete and how to file proof of service with the Appeals Board
- If parties all agree, parties may serve each other by e-mail.

§355.5

- We can accept electronic filings in PDF, TIFF, or JPEG file formats, though we prefer PDF. Please make sure your documents scan in legibly and contain no embedded data including viruses.

§355.4

- 4 methods of filing
- Filed documents must also be served on all parties
- Unless otherwise provided by regulation or statute, document is deemed filed on date it is hand delivered, electronically filed, or received by Appeals Board.
- E-filed documents are only considered filed same day if filed before 11:59 p.m. PST
- Describes the categories of documents that may be e-filed
- Describes the information that must be provided when e-filing a document

§355.6

- Pay close attention to these requirements to ensure that your documents are able to be filed properly. Documents that do not comply may be rejected. Please note that there are different requirements for documents used as evidence at hearing.

§359.1

- Explains the requirements for filing an appeal. Pay close attention to the deadline for submitting completed appeal after notifying Appeals Board of intent to appeal.



§359

- This section clarifies the timeline for filing an appeal, as well as exceptions to the filing requirements.
- Clarifies circumstances under which the Appeals Board may find good cause for a late appeal.

§361.3

- Now provides examples of affirmative defenses that employers may choose to plead.

§362

- Provides the procedure for obtaining a stay of abatement after the filing of a petition for reconsideration.
- Ordinarily, if a decision affirms the citation, the employer will need to abate. This section provides a limited exception.

§364

- Clarifies procedures for withdrawal of an appeal
- Provides limited exception for reinstatement due to fraud, mutual mistake etc.

REGULATION

§364.1

- Sets forth the procedure for the Division to withdraw all or part of its action/citations.

§364.2

- Division may now prepare a settlement order that, once signed by all parties, may be submitted to the Appeals Board for acceptance or rejection.
- Contains posting requirements.

§372.6

- Provides a procedure for extending time to file a motion to compel upon showing of good cause.
- Hearings are not mandatory. The judge may hold a conference with the parties prior to ruling.
- Gives the responding party 15 days from services to serve and file a response to a motion to compel.



§372.8

- Clarifies that discovery in OSHAB proceedings is limited to what is provided in the Board's regulations.

§372.9

- Division is now expected to provide discovery to the employer within 30 days of receipt of the docket packet.
- Limited privileges are still recognized, such as attorney-client.
- Division has a duty to update its production if it discovers new relevant materials during the appeal.



§376

- Regulatory and General cases may be calendared based on different criteria than other cases.

§376.4

- Oversized, physical, or other types of exhibits that cannot be scanned into OASIS may be released to a party or participant who will maintain custody of the exhibit until a final determination of the appeal.
- Parties may stipulate at hearing to substitute a photograph of such an exhibit for the actual exhibit as part of the administrative record, subject to the ALJ's approval.

§376.7

- Parties may elect between electronic recording by the Appeals Board or a transcript prepared by a certified court reporter.
- Parties may stipulate to have the recording transcribed by a court reporter after the hearing and request an order designating the transcript as the official record.
- In either case, the requesting party must provide a copy of the transcript to the Appeals Board at no cost.

§380

- Briefs may not exceed 15 pages unless otherwise ordered by the ALJ.
- ALJs may order pre-hearing briefs
- Remember: briefs are called briefs because they should be concise and to the point. The ALJ does not want you to re-litigate the entire case in writing.
- Briefs should cite to relevant authorities.

§383

- Revised procedures for dismissal for failure to appear at a noticed event.



§391.1

- A petition for reconsideration that does not attach a proof of service will be deemed filed the date it is delivered to the Appeals Board in Sacramento

§392.5

- Requests for recording may be made electronically by contacting the Appeals Board by e-mail
- Please provide an e-mail address where you can receive the recording.
 - Currently, the Appeals Board provides a download link to the requesting party
- If you want the recording on physical media, the requesting party bears the cost of reproduction

Segment 4

Part B: Live Demonstration of the
OASIS portal

Segment 5

Open Discussion

Respond to your Question Cards

Comments and Feedback

4:15pm - 5:00pm

Thank You

Please send us your feedback!